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No. 08-441

In The
Supreme Court of the United States

JACK GROSS,

Petitioner,

v.

FBL FINANCIAL GROUP, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Must a plaintiff present direct evidence of discrimination in order to obtain a mixed-motive instruction in a non-Title VII discrimination case?

RULE 29.6 STATEMENT

FBL Financial Group, Inc. does not have a parent corporation and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

In this case arising under the Age Discrimination in Employment Act, 29 U.S.C. § 621, *et seq.*, ("ADEA"), the court of appeals applied this Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and correctly held that the trial court had improperly instructed the jury, mandating reversal and a new trial. Specifically, the court held that, without sufficient evidence of discriminatory motive, the jury instructions improperly shifted to the employer the burden of persuading the jury that the employer acted for permissible rather than impermissible age-based reasons.

Petitioner Jack Gross and the United States argue that this Court should re-examine and reject *Price Waterhouse*'s requirement that the employee must present "substantial" or "direct" evidence of discrimination to shift the burden of proof on causation to the employer. *See id.* at 259 (White, J., concurring in the judgment); *id.* at 276 (O'Connor, J., concurring in the judgment). If *Price Waterhouse* is to be re-examined, however, all aspects should be reconsidered. The burden shifting it authorizes is inconsistent with the text and purpose of the ADEA; it is a departure from conventional rules of civil litigation; its precise holding was never resolved; and it is unworkable and unfair to employers. This Court should hold that the *McDonnell Douglas* framework governs all cases and that the employee always retains the burden of proof on causation. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). For

this reason, the court of appeals' judgment that the jury instructions were unlawful should be affirmed.

Unless the Court overrules *Price Waterhouse*, it, and not *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003), still governs under the ADEA. And, under *Price Waterhouse*, Gross clearly failed to present substantial or direct evidence of intentional age discrimination sufficient to shift the burden of persuasion to FBL. Shifting the burden of persuasion on the ultimate issue of whether the challenged act was taken for a discriminatory reason is an extraordinary departure from the ordinary rules of civil litigation. If this is to occur at all, it should occur only under a heightened standard. Moreover, the heightened "substantial" or "direct" standard of *Price Waterhouse* is not, as Gross and the United States claim, a requirement for evidence that is not circumstantial. Although there is conflict on this question, many courts of appeals have correctly treated it as a requirement that the employee produce substantial evidence that directly relates to the decisionmaking process that resulted in the adverse employment action at issue. For this reason also, the court of appeals' judgment that the jury instructions were unlawful should be affirmed.

STATEMENT OF THE CASE

1. *Background*. Respondent FBL Financial Group, Inc. ("FBL") is a publicly traded corporation

affiliated with, and responsible for managing, several entities, including Farm Bureau Mutual Insurance Company, a property-casualty insurer. Appellant's Appendix 520-21. FBL has its headquarters in Des Moines, Iowa, and has property-casualty insurance operations in Iowa, Arizona, Kansas, Minnesota, Nebraska, New Mexico, South Dakota, and Utah. Appellant's Appendix 518, 521.

As with many companies over the years, FBL's internal and external structure has changed from time to time. This case arises out of two such changes and Gross's role in them. Gross, born in 1948, began working for a predecessor to FBL in 1987. Pet. App. 2a. Over time he rose through the ranks until, in 1999, he was promoted to Claims Administration Vice President with oversight responsibility for physical damage, property specialists, workers' compensation, medical supervision, subrogation, call center, and the processing portions of FBL's property-casualty claims operations. Tr. 69-70, 72, 293.

In 2000, Barbara Moore became FBL's Chief Operating Officer for property-casualty claims companies. Tr. 640-41. One of Moore's first decisions in her new role was to streamline the management structure and improve the efficiency of FBL's claims department in which Gross worked. Tr. 90, 95, 417, 419-20. As part of that process, Moore removed Gross's vice president title and renamed his position "Claims Administration Director." Pet. App. 2a. Although neither his salary nor his job responsibilities changed, Pet. App. 2a, Gross nevertheless considered

the alteration a demotion because FBL reduced the "points" assigned to Gross's position.[1] Pet. App. 2a.

As part of the same reorganization, Moore also demoted Gross's boss, Tom Eppenauer, and replaced him with Andy Lifland.[2] Tr. 83, 284, 289, 417. Eppenauer had hired Gross in 1987, Tr. 63, and had repeatedly recommended Gross for promotions and generous merit salary increases. Tr. 72, 82, 107, 285; Appellant's Appendix 383, 387-88, 391-95, 402, 409, 416, 423, 430. Gross was fiercely loyal to Eppenauer as a result.

That loyalty did not transfer to Moore or Lifland. Gross thought Moore and Lifland were "outsiders" who brought unwanted change to an organization that had been efficiently run by "Midwest farm boy[s]." Tr. 187, 194-95, 202-06. Gross was distraught over Eppenauer's demotion and criticized Lifland and

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[1] FBL uses the Hay point system as a blind method of valuing positions, as opposed to individuals, within the company. Tr. 86-87, 612-15. Factors considered in the point assignment include job knowledge, accountability, decisionmaking responsibilities and problem solving responsibilities. Tr. 612-15. Salary grade for each position at FBL is determined based on the number of Hay points assigned to it. Tr. 86-87, 612-15.

[2] There was never any debate that Eppenauer's demotion was unrelated to age. Indeed, Eppenauer acknowledged that he was "exactly the same age" as his replacement, Lifland. Tr. 334. Eppenauer believed he was demoted because Moore wanted to work with Lifland, a person with whom she had worked for several years in the Arizona-New Mexico Farm Bureau operation before moving to Iowa. Tr. 290, 316, 418-19.

Moore because they did not share Eppenauer's vision for the claims department. Tr. 64-65, 103. Indeed, Gross believed the entire reorganization was unnecessary. Tr. 100-03.

After the reorganization, Gross repeatedly described Lifland with generalized animosity, contempt, and criticism. Tr. 105-07, 231. In one noteworthy instance, Gross and Lifland's interaction devolved into an argument with Lifland contending Gross had called him a liar. Tr. 120-21, 241-43; Appellant's Appendix 576. Gross was particularly upset by Lifland's evaluations of his performance, starting with the first evaluation of Gross that Lifland completed shortly after the reorganization. Tr. 98, 110-17; Appellant's Appendix 507, 516. According to Gross, Lifland's evaluations were unduly critical of him. Tr. 98, 110-17, 229, 231-32. In fact, the undisputed record reflected that all of Lifland's evaluations, including his evaluations of Gross, were substantially less generous than Eppenauer's.[3]

On January 1, 2003, Farm Bureau Insurance Company of Nebraska and Farm Bureau Mutual Insurance Company, Inc., a Kansas entity, merged with the Farm Bureau Mutual Insurance Company headquartered in Iowa. Tr. 403-04. The merger

[3] Specifically, Lifland's performance evaluation scores for all employees were, on average, 15-20 points less than Eppenauer's average scores. Tr. 592-93; Appellant's Appendix 562. Gross was treated like all other employees Lifland supervised.

prompted a second reorganization of FBL's claims department. Tr. 532. As a result of this second reorganization, FBL added 175-200 employees to the claims department,[4] Tr. 597, and significantly altered its management structure. Tr. 532.

In particular, FBL named Lifland Vice President of Claims, Tr. 444, and Steve Wittmuss, who came from the Nebraska organization, Regional Claims Vice President, a new position designed to serve as Lifland's "second in command." Tr. 444. In addition, FBL transferred oversight responsibilities of several functional reporting units, including property, workers' compensation and medical management, from Gross's pre-merger position to the new Regional Claims Vice President position. Tr. 130, 445; Appellant's Appendix 527, 540.

Due to this reduction in oversight responsibilities, FBL changed the title of the Claims Administration Director position to Claims Administration Manager and eliminated the Director position. Tr. 445; Appellant's Appendix 550-51. The new position was left with responsibility only for oversight of the direct loss reporting unit that handled claim calls, processing, and subrogation. Tr. 577-78; Appellant's Appendix 539, 545. FBL reduced the points and

[4] FBL offered a voluntary early retirement incentive plan ("VERIP") to qualifying Kansas and Nebraska employees over age 52. Tr. 596-97. Gross was not offered the VERIP because, as an Iowa employee, he was not eligible. Tr. 122, 603.

salary grade associated with the downgraded Claims Administration Manager position to reflect the reduction in responsibilities.[5] Appellant's Appendix 504, 547-51. FBL also created a Claims Project Coordinator position to tackle integration issues that arose with the merger. Tr. 505-06; Appellant's Appendix 554-55. That position had the same salary points and pay grade as the Claims Administration Manager position. Pet. App. 2a.

Lifland and Wittmuss decided to assign Gross to the Claims Project Coordinator position. Tr. 124, 445, 532-33; Appellant's Appendix 504. As Gross acknowledged, Lifland and Wittmuss made the assignment because they believed it was the best fit for him, since the position generally was project oriented and Lifland and Wittmuss believed Gross was a strong project manager. Tr. 123-24, 126, 432, 437-38, 507, 532-33. Simultaneously, Lifland and Wittmuss decided to assign Lisa Kneeskern, an employee in her 40s, to the Claims Administration Manager position. Tr. 129; Appellant's Appendix 504-05. Like Gross, Kneeskern had continuously worked in the insurance

[5] Gross argued that the Claims Administration Director position was not eliminated, but later admitted under oath in post-trial proceedings that the position no longer existed. Appellant's Appendix 626-27. The district court found that "Gross' former position no longer exists." Appellant's Appendix 633.

industry for approximately 20 years and met the qualifications for the position. Tr. 572-74, 577-78.[6]

Although his salary was not reduced, Tr. 88, 244; Appellant's Appendix 464, Gross believed the reassignment was a demotion because his points and salary grade were reduced,[7] and because he believed Kneeskern "assumed the functional equivalent of [his] former position, and his new position was ill-defined and lacked a job description or specifically assigned duties." Pet. App. 2a-3a.

2. *Proceedings*. Gross brought suit against FBL in the United States District Court for the Southern District of Iowa, alleging that, by assigning him to the Claims Project Coordinator position, the company intentionally discriminated against him because of his age in violation of the ADEA.[8]

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[6] Kneeskern was the subrogation manager prior to the merger. Appellant's Appendix 529. Eppenauer, who had previously supervised Kneeskern, testified that she was a "very good" employee, capable of performing well in the Claims Administration Manager position. Tr. 327, 333-34.

[7] Gross continued to be paid over $100,000 annually, Tr. 228, 244; Appellant's Appendix 464, and continued to receive annual merit salary increases after the merger. Tr. 244; Appellant's Appendix 464. Gross was, however, dissatisfied that his annual salary increases would no longer be in the 3-5% range. Tr. 100.

[8] Gross also pled claims of retaliation under the ADEA and the Iowa Civil Rights Act, Iowa Code ch. 216 (2005). The district court granted FBL summary judgment on the retaliation claims, J.A. 22-24, and Gross did not challenge that disposition on

(Continued on following page)

From the inception of the lawsuit, Gross's disparate treatment claim of discrimination rested on two theories: (1) there was no reason for his demotion, so it must have been because of his age; and (2) the other claims department employees over the age of 50 who were holding management positions were demoted at the same time. Complaint ¶¶ 13, 15-16.[9] At no time did Gross point to any statements made by any decisionmakers demonstrating an illegitimate factor played a substantial role in the employment decision that would suggest his placement in the new position was the result of age-based animus. At trial, no witness was aware of facts to show that age was a factor in the decision to assign Gross to the Claims Project Coordinator position. Tr. 157, 160-61, 248-49, 273, 363-64, 441-42, 445, 533, 570, 579-80, 619, 623.

Gross presented evidence regarding the impact of the merger on other "demoted" employees holding

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appeal. Gross also sought to amend his Complaint to assert a disparate impact claim under the ADEA. The district court denied leave to amend, finding that under *Smith v. City of Jackson*, 544 U.S. 228 (2005), the proposed amendment was futile. Gross did not appeal that denial.

[9] On direct examination, Gross testified that he was inferring age discrimination based on the treatment of others and the absence of any other explanation. J.A. 6 ("The only common thread was age."); J.A. 6 ("It was just a lack of any other reason."). In closing arguments, too, Gross's counsel acknowledged there was no evidence of age discrimination, and urged the jury to infer age was a motivating factor because "there simply was no other reason." Tr. 694; *see also* Tr. 701, 740-41, 746.

middle management positions in the claims department. In particular, Gross argued that the majority of employees holding such positions fell within the class protected by the ADEA.[10] FBL responded that although true, this fact was unsurprising, given that more than half of the employees holding middle management positions in the claims department were over the age of 50 in January 2003, Tr. 219-20; Appellant's Appendix 504-05, and more than three-quarters were over age 40. Appellant's Appendix 504-05.[11]

After a five-day trial, the district court submitted Gross's age discrimination claims under the ADEA and Iowa Civil Rights Act to a jury. The district court charged the jury that Gross had the burden to prove that "defendant demoted plaintiff to claims project coordinator effective January 1, 2003" and "plaintiff's age was a motivating factor in defendant's decision to demote plaintiff." J.A. 9-10. The district court instructed the jury that it could "find age was a motivating factor if [it found] defendant's stated reasons for its decision [were] not the real reasons, but [were] a pretext to hide age discrimination." J.A. 10. In a

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[10] No other person who was affected by the reorganization complained of age-based discrimination. Hills Test. Tr. 156-57; Juhl Test. Tr. 272.

[11] The company's demographics only skewed further over time. By November 2005, FBL's workforce predominately fell within the class protected by the ADEA. At the time of trial, the average age of all FBL employees was 48, Tr. 599, more than 60% of FBL's workforce was over age 40, Tr. 599-600, and nearly 30% was over age 50. Tr. 599.

separate instruction, the district court instructed the jury

> As used in these instructions, plaintiff's age was a "motivating factor," if plaintiff's age played a part or a role in the defendant's decision to demote plaintiff. However, plaintiff's age need not have been the only reason for defendant's decision to demote plaintiff.

J.A. 10. Most relevant for the purposes of this case, the district court further charged the jury that the "verdict must be for defendant . . . if it has been proved by the preponderance of the evidence that defendant would have demoted plaintiff regardless of his age." *Id*.

FBL objected to these instructions, and proposed the following in their place:

> Your verdict must be for Plaintiff if both of the following elements have been proven by the preponderance of the evidence:
>
> 1) Defendant demoted Plaintiff to claims project coordinator effective January 1, 2003; and
>
> 2) Plaintiff's age was the determining factor in Defendant's decision.
>
> If either of the above elements has not been proven by the preponderance of the evidence, your verdict must be for Defendant.

> "Age was a determining factor" only if Defendant would not have made the employment decision concerning Plaintiff but for his age; it does not require that age was the only reason for the decision made by Defendant.

J.A. 9.

The jury returned a verdict for Gross, awarding lost compensation in the amount of $46,945, consisting of $20,704 for lost past salary and $26,241 for lost past stock options. J.A. 8. The jury declined to award Gross damages for emotional distress, which were only available under state law. *Id.* The jury also found FBL's conduct was not willful. *Id.* Gross did not appeal these adverse rulings.

FBL appealed the decision to the Eighth Circuit, arguing, *inter alia*, that the district court erred in using a mixed-motive instruction. Relying on this Court's decision in *Price Waterhouse*, the Eighth Circuit articulated the standard for a mixed-motive jury instruction as follows:

> [T]o justify shifting the burden of persuasion on the issue of causation to the defendant, a plaintiff must show "by direct evidence that an illegitimate factor played a substantial role" in the employment decision. . . .

Pet. App. 5a. The court of appeals then explained the meaning of "direct evidence":

> "Direct evidence" for these purposes is evidence "showing a specific link between the

> alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" the adverse employment action. *Thomas*, 111 F.3d at 66 (internal quotation and brackets omitted). It does not extend to "stray remarks in the workplace," "statements by non-decision makers," or "statements by decision makers unrelated to the decisional process itself."

Pet. App. 5a. Using this "direct evidence" standard, the Eighth Circuit determined the district court's instruction was improper, since

> [t]he disputed instruction, however, provided that if Gross proved by any evidence – direct or otherwise – that age was "a motivating factor" in the employment decision, then the burden shifted to FBL to prove that its decision would have been the same absent consideration of Gross's age. . . . Gross conceded that he did not present "direct evidence" of discrimination . . . so a mixed motive instruction was not warranted under the *Price Waterhouse* rule. Gross's claim should have been analyzed under the *McDonnell Douglas* framework. The burden of persuasion should have remained with the plaintiff throughout, and the jury should have been charged to decide whether the plaintiff proved that age was the determining factor in FBL's employment action.

Pet. App. 6a-7a. The Eighth Circuit thus reversed the judgment of the district court and remanded for a new trial. Pet. App. 12a.

SUMMARY OF THE ARGUMENT

The text of the ADEA prohibits an employer from discriminating against any individual "because of such individual's age." 29 U.S.C. § 623(a)(1). In its decision in *Price Waterhouse*, this Court interpreted analogous language in Title VII ("because of such individual's sex"). A badly splintered majority agreed that if the employee presents sufficient evidence that sex was a motivating factor, among others, in an employer's challenged decision, the burden of persuasion on causation shifts to the employer to demonstrate that it would have taken the same action for legitimate reasons.

The majority did not agree, however, about what constituted sufficient evidence to shift the burden of persuasion to the employer. Justice O'Connor's concurring opinion posited that the shift required "direct evidence" of sex discrimination, *id.* at 276; Justice White's concurrence concluded that a "substantial" showing of sex discrimination was required, *id.* at 259. In the lower courts, the fractured nature of the decision resulted in confusion about the precise holding of the case, as this Court has recognized. *See Desert Palace*, 539 U.S. at 98.

This situation was further complicated by the passage of the Civil Rights Act of 1991 ("1991 Act"). That Act amended Title VII and statutorily overruled *Price Waterhouse* as it applied to Title VII, *id.* at 98-101; but Congress did not apply that specific amendment to the ADEA. The rules of production and persuasion governing cases arising under Title VII are now established by express statutory text, *see* 42 U.S.C. § 2000e-2(m), which was authoritatively interpreted by this Court in *Desert Palace*. But, Congress's deliberate choice not to extend that amendment to the ADEA means that *Price Waterhouse* governs cases under the ADEA, unless and until this Court overrules it.

The instant case arises in this setting. Both parties are, in essence, asking this Court to overrule *Price Waterhouse*. The United States asks this Court to hold that *Desert Palace* overruled the direct evidence requirement of *Price Waterhouse* not only as it would have applied under Title VII, but also as it now applies to cases under the ADEA. But the 1991 Act's revised framework for analysis of disparate treatment claims cannot reasonably be imposed on the ADEA when Congress deliberately chose not to do so.

FBL does agree, however, that *Price Waterhouse* should be re-examined: Its holding was never clear; it is a departure from conventional rules of civil litigation; it proved unworkable in practice; and it has unfairly shifted to employers the burden of persuasion. As FBL will demonstrate, if *Price Waterhouse* is to be reconsidered, all of it should be revisited, and

this Court should hold that the *McDonnell Douglas* framework governs in all cases and that the employee always retains the burden of demonstrating that the challenged employment action was "because of such individual's age." In that event, the jury was clearly misinstructed and therefore the case should be retried.

Alternatively, if this Court concludes that in some circumstances, the employee may present sufficient evidence that the employer acted "because of" age to shift to the employer the burden of persuading the factfinder that it acted for legitimate reasons, this Court should require at least substantial or direct evidence of unlawful motive.

The thrust of both Justice White's and Justice O'Connor's opinions concurring in the judgment in *Price Waterhouse* is that shifting the burden of persuasion on the ultimate issue of whether the challenged act was actually taken for a discriminatory reason is an extraordinary departure from the ordinary rules of civil litigation. The employee generally must show that the alleged harm was caused by discrimination, and it is unusual to require the employer affirmatively to prove that the alleged harm had another cause. It converts an element of the employee's affirmative case into an affirmative defense that must be proven by the employer, even though in the usual case, an employer would not have to prove an affirmative defense unless the employee had established his or her claim.

FBL thus submits that before the burden can shift, either "substantial" or "direct" evidence of discrimination should be required. It is important to understand what the word "direct" means in this context. It seems quite unlikely that Justice O'Connor originally intended her reference to "direct" evidence to stand in contrast to "circumstantial" evidence. Instead, "direct" evidence means evidence that is related directly to the challenged decision, *see* 490 U.S. at 271. Justice O'Connor's argument was that employees seeking the extraordinary advantage of shifting the burden of persuasion must bear more of a burden than merely a prima facie case. Put differently, the employee must present evidence that would allow the factfinder to conclude that discrimination was the proximate cause of the employer's action before the burden of proof on causation can be shifted.

The evidence presented here was neither substantial nor direct, and it did not support a shift in the burden of proof. The jury instructions were therefore erroneous. The court of appeals' judgment should be affirmed.

ARGUMENT

I. THE BURDEN OF PERSUASION AS TO CAUSATION SHOULD NEVER BE SHIFTED TO THE EMPLOYER TO DISPROVE DISPARATE TREATMENT AGE DISCRIMINATION.

Gross and the United States argue that because the statutory language of the ADEA does not contain any special evidentiary provision requiring direct evidence to shift the burden of persuasion as to causation to the employer in a case alleging disparate treatment, this Court's typical reliance on "conventional rules of civil litigation" dictates that no such requirement should be imposed. Petitioner's Brief 11, 13, 26. Instead, Gross and the United States contend that, in all ADEA disparate treatment cases, once the employee presents any evidence of age-based animus, the burden of persuasion should shift to the employer to prove the absence of causation. Petitioner's Brief 47-48.

FBL agrees the language of the ADEA contains no elevated evidentiary threshold. To that extent, therefore, FBL agrees with Gross's and the United States' contention. But Gross and the United States fail to follow their argument to its logical conclusion, namely, that just as the ADEA contains no elevated evidentiary threshold, it also contains no provision requiring a shift of the burden of persuasion on causation to the employer. As a consequence, as would be true under "conventional rules of civil litigation," in disparate treatment cases, "[t]he ultimate burden

of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000) (quoting *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981)).

A. The ADEA prohibits taking adverse employment action against an employee "because of" that employee's age.

The ADEA makes it unlawful "to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). As the language makes plain, an employer is liable for violating the ADEA only if it takes an employment action adverse to an employee based on the employee's age. The outer reaches of the meaning of the phrase "because of" are not free from doubt, but FBL believes the phrase is best interpreted as imposing a common sense but-for causation standard.[12] In the mine-run of cases, therefore, of which

[12] The Oxford English Dictionary defines the word "because" as "for the reason that." 2 Oxford English Dictionary 41 (2d ed. 1989). Webster's Third New International Dictionary defines "because of" as "by reason of" or "on account of." Webster's Third New International Dictionary 194 (2002). Each of these definitions suggests that "because of" means had a determinative influence on the outcome. Nor was this definition any

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this case is certainly one, a factfinder must find that age-related animus caused the employer's challenged action to find a violation. If the employer acted for some other reason or reasons, it did not act "because of" the employee's age.

Senator Yarborough, floor manager of the bill that became the ADEA, noted in his opening statement describing the purpose of the legislation and its major provisions: "In simple terms, this bill prohibits discrimination in hiring and firing workers *solely because* they are over 40. . . ." 113 Cong. Rec. 31,252 (1967) (emphasis added). Similarly, the Committee Report on the ADEA recognized that "[t]he purpose of this legislation, simply stated, is to insure that age, within the limits prescribed herein, is not a *determining factor* in a refusal to hire." 113 Cong. Rec. 31,251 (1967) (emphasis added).

Indeed, this Court has repeatedly interpreted the ADEA's statutory text to require an employee to prove as an essential element of his claim that the consideration of age was outcome determinative as to the adverse action at issue. *See, e.g.*, *Reeves*, 530 U.S. at 141 ("the plaintiff's age must have 'actually played a role in [the employer's decisionmaking] process and had a *determinative influence* on the outcome'") (emphasis added); *Hazen Paper Co. v. Biggins*, 507

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different when the ADEA was enacted. Webster's Third New International Dictionary 194 (1966) ("by reason of: on account of").

U.S. 604, 610 (1993) (the employee must prove that age actually motivated the employer's decision).

Most recently, in *Kentucky Retirement Systems v. EEOC*, 128 S.Ct. 2361 (2008), this Court was faced with the question whether Kentucky's retirement system for those working in hazardous positions violated the ADEA because it treats some who become disabled *before* becoming eligible for retirement more favorably than it treats some who become disabled *after* becoming eligible for retirement on the basis of age. Even though the potential size of an employee's retirement benefits depended on his or her age at the time of disability, this Court held that, for several reasons, the distinctions in the Kentucky system "were not '*actually motivated*' by age." *Id.* at 2367 (emphasis added). That holding makes sense only if the ADEA requires that age be the *actual* cause of the challenged action.[13]

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[13] This Court has interpreted comparable statutory text under Title VII, 42 U.S.C. § 2000e-2(a), to require an employee to prove that consideration of an unlawful factor was outcome determinative in the adverse action at issue. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993); *Burdine*, 450 U.S. at 256; *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976) (to establish causation, a plaintiff must show the impermissible consideration was a "but for" cause of the adverse employment action). In these cases, the Court has consistently held that the ultimate question is "discrimination *vel non*." *Reeves*, 530 U.S. at 143; *St. Mary's Honor Ctr.*, 509 U.S. at 518; *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 714 (1983).

B. Under the ADEA, the burden of persuasion as to causation must at all times remain with the employee presenting a disparate treatment claim.

Just as the language of the ADEA is clear that it requires "but-for" causation to hold an employer liable for age discrimination, it is equally clear that the ADEA never shifts to the employer the burden of persuasion as to that causation determination. Indeed, one will search in vain for any language in the ADEA purporting to shift the burden of persuasion to the employer with respect to causation.[14]

Against that backdrop, this Court has consistently held that conventional rules of civil litigation are applicable to federal employment discrimination statutes, *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395, 2406 (2008); *Desert Palace, Inc., v. Costa*, 539 U.S. 90, 99 (2003); *Aikens*, 460 U.S. at 714 n.3, primary among which is the rule that, absent

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[14] The legislative history of the ADEA supports the best reading of the text. Senator Javits made the following comment:

> The whole test is somewhat like the test in an accident case – did the person use reasonable care. A jury will answer yes or no. The question here is: Was the individual discriminated against solely because of his age? The alleged discrimination must be proved *and the burden of proof is upon the one who would assert that that was actually the case*.

113 Cong. Rec. 31,255 (1967) (emphasis added). The bill sponsor, Senator Yarborough, agreed in substance with Senator Javits's interpretation.

statutory language otherwise allocating the burden of production and persuasion, the "plaintiffs bear the risk of failing to prove their claims." *Schaffer v. Weast*, 546 U.S. 49, 56 (2005); *see also FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948); C. Mueller & L. Kirkpatrick, Evidence § 3.1, p. 103 (3d ed. 2003) (standard rule is the plaintiff asserting a claim "wins only if, on the basis of the evidence, the facts seem more likely true than not").

That is of course, why, even when this Court first grappled with Congress's newly minted anti-discrimination statutes in *Burdine* and *McDonnell Douglas*, the Court left the burden of persuasion where it traditionally lay – with the plaintiff-employee. In both cases, although the Court created a framework for determining causation – specifically, the employee must present a prima facie case of discrimination at which time the burden of production switches to the employer to proffer a non-discriminatory reason – it never abandoned the traditional rule.[15] Rather, this Court was careful to note, that "[t]he ultimate burden of persuading the

[15] This Court has long and explicitly recognized the significant difference between shifting the burden of production and shifting the burden of persuasion. In *St. Mary's Honor Center*, the Court noted its authority to, "according to traditional practice, establish certain modes and orders of proof" including a rebuttable presumption of the sort established by *McDonnell Douglas*. 509 U.S. at 514; *see also Burdine*, 450 U.S. at 255 n.8. Courts have the inherent power to control the modes and methods of proof. Fed. R. Evid. 301.

trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253.

The only place in the ADEA in which one finds support for placing the burden of persuasion on the employer at all is in Section 623(f), which defines the ADEA's affirmative defenses. More specifically, after delineating the ways in which an employer could violate the ADEA, Congress, in 29 U.S.C. § 623(f), provided an employer may, without violating the ADEA, rely on age in the following ways: 1) employ "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business"; 2) employ a differentiation based on reasonable factors other than age; 3) employ a differentiation in order to comply with local foreign law; 4) observe the terms of a bona fide seniority system (with some exceptions); and 5) observe the terms of a bona fide employee benefit plan (with some exceptions).

As this Court noted in *Meacham v. Knolls Atomic Power Laboratory*, the placement and purpose of these provisions make clear that they are affirmative defenses. 128 S.Ct. at 2400 ("Given how the [ADEA] reads, with exemptions laid out apart from the prohibitions (and expressly referring to prohibited conduct as such)," this Court has consistently described the provisions contained in Section 623(f) as "the ADEA's 'five affirmative defenses.'" (quoting *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 122 (1985))). And, because they are affirmative defenses, the Court

held that they should be interpreted against the "longstanding convention" that "[w]hen a proviso . . . carves an exception out of the body of a statute or contract those who set up such exception must prove it." *Id*. (quoting in part, *Javierre v. Cent. Altagracia*, 217 U.S. 502, 508 (1910)).

Meacham is important here for two reasons. First, it demonstrates that this Court, when interpreting the ADEA, has chosen not to depart from settled conventions concerning the placement of the burden of persuasion and that it would not generally do so unless it has "compelling reasons" to think Congress intended that result. *See Meacham*, 128 S.Ct. at 2400. For all the reasons noted above, no such compelling reasons exist here.

Second, *Meacham* makes plain that when Congress wished to place the burden of proof on employers under the ADEA, it knew how to do so explicitly. 128 S.Ct. at 2400; *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion"); *Lehman v. Nakshian*, 453 U.S. 156, 162-63 (1981) (declining to infer right to jury trial for federal employees suing for age discrimination where Congress expressly recognized right to jury trial under the ADEA but did not do so for federal employer cases).

Given the absence of statutory language articulating a departure from the conventional rule allocating to the employee the burden of persuasion of his or her claims, this Court should not impose a different burden-shifting framework on the ADEA.[16] Instead, the Court should read the ADEA "the way Congress wrote it."[17] *Meacham*, 128 S.Ct. at 2406.

C. This Court should overrule *Price Waterhouse* with respect to its application to the ADEA.

Notwithstanding all of the foregoing, this Court, in *Price Waterhouse*, departed from the conventional rules allocating the burden of persuasion to the employee and engrafted onto Title VII a rule shifting the burden of persuasion to the employer in certain circumstances. More specifically, the Court articulated

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[16] Gross contends it is unfair to require the employee to bear the burden of proof on causation because the employer has superior access to evidence about the cause of its actions. This is an insufficient basis to disregard the text and traditional rule. Liberal discovery rules will permit the employee to probe the employer's evidence on causation. For example, here, Gross took 18 depositions and FBL produced more than 2,000 documents. Tr. 715.

[17] Even the United States agrees the burden should be with the employee, acknowledging, "the ADEA does not diminish what the *plaintiff* must prove: age discrimination," Brief for the United States 11 (emphasis added), and "[t]his Court's precedents accordingly make clear that a *plaintiff* must show that an adverse employment action was actually caused by an age-based motive." *Id.* at 13 (emphasis added).

an exception to the longstanding *McDonnell Douglas* framework for use in cases where substantial or direct evidence demonstrates that the employer considered both permissible and impermissible factors in the decisionmaking process.[18] Under the *Price Waterhouse* framework, once an employee presents such evidence that an impermissible consideration was a substantial factor in the decisionmaking process, the burden of persuasion shifts to the employer to show the absence of causation. 490 U.S. at 244-45, 259-60, 277-78.

Twenty years later, the question of which of three opinions in *Price Waterhouse* is controlling remains unsettled.[19] The four-Justice plurality opinion described a mixed-motive framework as an alternative to the *McDonnell Douglas* pretext framework in cases where "both legitimate and illegitimate considerations played a part in the decision." *Id.* at 247 n.12.

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[18] Gross did not present evidence that demonstrated decisionmakers had any discriminatory animus. Instead, the evidence he presented at trial fit the *McDonnell Douglas* framework. Gross's evidence established a prima facie case. He proved that he was over age 40, that he was qualified for the Claims Administration Manager position and he received favorable performance evaluations, that he was subject to an adverse employment action in that his position was downgraded and a younger woman (in her 40s) was assigned to his desired position. He also presented evidence that other managers in his salary grade experienced demotions in that their salary points and pay grades were reduced.

[19] In *Desert Palace*, this Court declined to decide which *Price Waterhouse* opinion was controlling. 539 U.S. at 98.

Justice O'Connor's concurring opinion, by contrast, set forth an evidentiary standard shifting the burden of persuasion to the employer on the issue of causation only after the employee showed by "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision."[20] *Id.* at 277-78. Once the employee made such a showing, Justice O'Connor found that the burden of persuasion should be shifted to the employer to prove that it would have made the same decision based upon other, legitimate considerations. *Id.* at 278. Justice White's concurring opinion expressed agreement with Justice O'Connor's analysis that an employee's "burden was to show that the unlawful motive was a *substantial* factor in the adverse employment action," *id.* at 259 (emphasis in original), but Justice White did not expressly embrace Justice O'Connor's language regarding direct evidence of discrimination.

When a fragmented court decides a case and "no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members

[20] The plurality in *Price Waterhouse* did not provide any particulars about when the evidence would be sufficient to use the mixed-motive burden-shifting analysis. Instead, it determined the trial judge's factual finding that sex was a factor considered in the decisionmaking process was not clearly erroneous. 490 U.S. at 255-57. It also indicated that its standard was not significantly different than Justice O'Connor's standard, *id*. at 250 n.13, though Justice O'Connor disagreed, *id*. at 277.

who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977). Justice O'Connor concurred in the judgment on the most narrow ground in that she would permit burden shifting only when an employee has presented direct evidence that the illegitimate factor played a substantial role in motivating the employer's decision. Applying *Marks*, Justice O'Connor's concurring opinion is the controlling opinion that sets forth the governing rule of law.[21]

At the very least, however, it is clear under *Price Waterhouse* an employee must show substantially more than a prima facie case in order to receive a burden-shifting instruction. Justices White and O'Connor both explicitly said so. 490 U.S. at 259 (White, J., concurring in the judgment) ("And here . . . as the Court now holds, Hopkins was not required to prove that the illegitimate factor was the only, principal, or true reason for petitioner's action. Rather, as Justice O'Connor states, her burden was to show that the unlawful motive was a *substantial* factor in the

[21] Some courts of appeals expressly recognize that Justice O'Connor's concurring opinion is controlling. *See, e.g.*, *Worden v. SunTrust Banks, Inc.*, 549 F.3d 334, 342 n.7 (4th Cir. 2008); *Fakete v. Aetna, Inc.*, 308 F.3d 335, 338 n.2 (3d Cir. 2002); *Melendez-Arroyo v. Cutler-Hammer de P.R. Co., Inc.*, 273 F.3d 30, 35 (1st Cir. 2001); *Haynes v. W.C. Caye & Co., Inc.*, 52 F.3d 928, 931 n.8 (11th Cir. 1995). Others have implicitly done so. *See, e.g.*, *Rowan v. Lockheed Martin Energy Sys., Inc.*, 360 F.3d 544, 548 (6th Cir. 2004); *Frobose v. Am. Savings & Loan Ass'n of Danville*, 152 F.3d 602, 617 (7th Cir. 1998); *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564, 1568-69 (2d Cir. 1989).

adverse employment action," at which point the burden shifts) (emphasis in original); *id*. at 278 (O'Connor, J., concurring in the judgment) (employee must show that illegitimate factor "was a substantial factor in the particular employment decision" to receive instruction). The plurality noted that an employee must show more than a prima facie case under *McDonnell Douglas*, but failed to provide further detail, *id*. at 237-38 (saying that although Price Waterhouse contended the burden failed to shift "even if a plaintiff shows that her gender played a part in an employment decision" and Hopkins argued that liability should be found "whenever [an employer] allows [an illegitimate consideration] to play any part in an employment decision," the plurality thought "the truth lies somewhere in between"). The plurality did note its belief that its conception of the required employee's proof was not "meaningfully different" from Justice O'Connor's. *Id*. at 250 n.13.

In the final analysis, however, no matter which opinion in *Price Waterhouse* is controlling, FBL submits that this Court should reconsider and overrule the decision as it applies under the ADEA.[22] Shifting

[22] In point of fact, to FBL's knowledge, this Court has never held that *Price Waterhouse* applies to the ADEA. Indeed, the closest the Court has come was in *McKennon v. Nashville Banner Publishing Company*, 513 U.S. 352 (1995), in which the Court cited *Price Waterhouse* in the process of explaining "[m]ixed motive cases," which the Court then held *McKennon* was not. *Id*. at 360 ("Mixed motive cases are inapposite here, except to the important extent they underscore the necessity of

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the burden of persuasion as to causation to the employer is inconsistent with the ADEA's statutory text and legislative history, with this Court's opinions interpreting the ADEA, and with conventional rules applicable to civil litigation.[23]

In evaluating whether to overrule existing precedent, this Court typically considers the extent to which a governing decision has created an unworkable legal regime, *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 127 S.Ct. 2652, 2685 (2007), the practical workability of the rule promulgated by the decision, *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854 (1992), the degree of reliance on the rule and the hardship or inequity, if any, that would result from repudiation of the rule, *id*. at 854-55, the extent to

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determining the employer's motives in ordering the discharge, an essential element in determining whether the employer violated the federal antidiscrimination laws."). There is, however, nothing in the text of the ADEA now and the text of Title VII at the time of *Price Waterhouse* that would justify different treatment. *See, e.g.*, *Thurston*, 469 U.S. at 121 ("interpretation[s] of Title VII" often "appl[y] with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII.'" (quoting *Lorillard v. Pons*, 434 U.S. 575, 584 (1978))).

[23] The end result of *Price Waterhouse* is to make disparate treatment litigation more costly and perilous for employers. Only recently this Court recognized that "putting employers to the work of persuading factfinders . . . makes it harder and costlier to defend than if employers merely bore the burden of production." *Meacham*, 128 S.Ct. at 2406.

which the rule is nothing more than a remnant of an abandoned doctrine, *id.* at 855, and the degree to which circumstances have changed so as to "rob[ ] the old rule of significant application or justification," *id*. All of these factors militate in favor of overruling *Price Waterhouse* as applied to the ADEA.

First, as discussed above, *Price Waterhouse* is unsupported by the ADEA's statutory text or the common law rules applicable to civil litigation that have traditionally underpinned that text's interpretation. This was no less true with respect to the text of Title VII in effect at the time *Price Waterhouse* was decided and that was at issue in that case. In order to justify the shift in burden, the plurality, Justice White, and Justice O'Connor all looked to what they believed was the "intent of Congress and the purposes behind Title VII." 490 U.S. at 263 (O'Connor, J., concurring in the judgment); *see also id.* at 239-42, 248 (plurality); *id*. at 260 (White, J., concurring in the judgment). Justice O'Connor in particular seemed to think that, once the employee showed direct evidence of discriminatory motive, the employer should be viewed with a jaundiced eye. *Id*. at 265-66 (O'Connor, J., concurring in the judgment) (once direct evidence has been proffered, "[t]he employer has not yet been shown to be a violator, but neither is it entitled to the same presumption of good faith concerning its employment decisions which is accorded employers facing only circumstantial evidence of discrimination"). Even though Justice O'Connor's test has the salutary feel of rough justice, nothing in Title VII at

the time, and nothing in the ADEA today, supports her decision. As this Court held in *Meacham*, the Court "ha[s] to read [the ADEA] the way Congress wrote it." 128 S.Ct. at 2406.

Second, as noted above, the opinion was splintered and has been difficult to interpret.[24] As a result, and as this Court has recognized, it is not wholly clear what the rule in *Price Waterhouse* is. *See Desert Palace*, 539 U.S. at 98. It cannot be the case that revisiting the effect or reach of a case that was unclear from its inception, and that this Court has said explicitly is uncertain, could be cause for complaint from those attempting to apply it. In fact, overruling *Price Waterhouse* would bring needed clarity back to this area of the law rather than upset any settled expectations.

Third, courts have found *Price Waterhouse* hard to implement in the jury trial context.[25] Applying

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[24] One commentator has noted that Justice O'Connor's controlling concurrence, while widely adopted, has proven "practically unworkable and theoretically unprincipled. . . . " Jamie Prenkert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas's Longevity and the Mixed-Motives Mess*, 45 Am. Bus. L.J. 511, 532 (2008). *See also* Robert Kearney, *The High Price of Price Waterhouse: Dealing with Direct Evidence of Discrimination*, 5 U. Pa. J. Lab. & Emp. L. 303 (2003).

[25] *See, e.g.*, *Watson v. Se. Pa. Transp. Auth.*, 207 F.3d 207, 220 (3d Cir. 2000) (recognizing the challenge of trying to instruct jurors on the mixed-motive instruction while noting it would be uncommon for a plaintiff to make the demonstration demanded under Justice O'Connor's *Price Waterhouse* concurrence);

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Price Waterhouse to disparate treatment claims cultivates unpredictability for litigants in preparing for and presenting cases at trial. *See* 490 U.S. at 291-92 (Kennedy, J., dissenting) ("Confusion in the application of dual burden-shifting mechanisms will be most acute in cases brought under . . . the Age Discrimination in Employment Act (ADEA), where courts borrow the Title VII order of proof for the conduct of jury trials."). Procedurally, *Price Waterhouse* involved an appeal of a judgment rendered after a bench trial. In the jury trial context, however, the framework is impractical and imprecise. Parties need to have some understanding as to what jury instructions a court will use well before exchanging witness and exhibit lists, offering opening statements, or presenting evidence at trial. The dual framework does not provide certainty with respect to how a trial court will instruct the jury on the elements of proof and the parties' respective burdens. Parties must wait until the eleventh hour, on the eve of closing argument, to

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Ostrowski v. Atl. Mut. Ins. Cos., 968 F.2d 171, 186 (2d Cir. 1992) (discussion of confusion *Price Waterhouse* caused in the ADEA jury trial context because *Price Waterhouse* involved a bench trial under Title VII); *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1179 (2d Cir. 1992) (describing the task of devising a *Price Waterhouse* jury instruction as "the murky water" of shifting burden in discrimination cases); *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 661 (7th Cir. 1991) (Flaum, J., dissenting) ("As Justice Kennedy observed in his *Price Waterhouse* dissent, formulating a jury instruction that explains the burden shifting analysis applicable to mixed motive cases in the wake of that decision is no mean feat.").

find out whether the trial court has identified the case as falling within the single motive or mixed-motive framework.

This case illustrates that uncertainty and its costs. Gross and FBL litigated a classic *McDonnell Douglas* case that Gross's own counsel characterized as turning not on a "smoking gun," but rather on "circumstance[ ]." Tr. 740, 746. Only after the close of the evidence was FBL faced with the specter of a "mixed-motive" instruction with its shifting burden of persuasion.

Fourth, there is no practical distinction between a single motive and a mixed-motive case, so *Price Waterhouse* has no functional purpose. If an employee has "direct" evidence of discrimination, such as a facially discriminatory policy, the conventional method of allocating the burden of proof and persuasion does not impair the employee in presenting his or her case. *See*, *e.g.*, *Thurston*, 469 U.S. at 122. The employee simply offers the evidence, which both establishes a prima facie case and satisfies the ultimate burden of persuasion. This likely explains why the *McDonnell Douglas* framework has always contemplated that a disparate treatment case may be characterized as single motive or mixed-motive. In *Burdine*, for example, the Court recognized that under Title VII a disparate treatment employee may succeed "directly by persuading the [trier of fact] that a discriminatory reason *more likely* motivated the employer. . . ." 450 U.S. at 256 (emphasis added). Clearly, the Court was contemplating that in the first

set of circumstances it was *less likely* another, nondiscriminatory reason caused the employer's decision.

Fifth, Congress, by enacting the 1991 Act, abandoned *Price Waterhouse* in the very context in which it first arose. Pub. L. No. 102-166, 105 Stat. 1071 (Nov. 21, 1991). More specifically, Congress amended Title VII to affirm that the conventional rules of civil litigation govern, and the burden of persuasion always rests with the party making the claim.[26] One portion of the 1991 Act, now contained in 42 U.S.C. § 2000e-2(m), created an alternative basis for imposing liability, stating:

> Except as otherwise provided in this title, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

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[26] H.R. Rep. No. 102-40(II) (1991), states in part that

> In *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989), the Supreme Court ruled that an employment decision motivated in part by prejudice does not violate Title VII if the employer can show after the fact that the same decision would have been made for nondiscriminatory reasons. Section 5 of the Act responds to *Price Waterhouse* by reaffirming that any reliance on prejudice in making employment decisions is illegal. At the same time, the Act makes clear that, in considering the appropriate relief for such discrimination, a court shall not order the hiring, retention or promoting of a person not qualified for the position.

Pub. L. No. 102-166, § 107. The 1991 Act went on to state, for purposes of Title VII, "[t]he term 'demonstrates' means meets the burdens of production and persuasion." Pub. L. No. 102-166, § 104. In other words, Congress expressly returned the burden of persuasion to the employee on all elements of Title VII claims.[27]

Finally, this Court itself recently passed on the opportunity to apply *Price Waterhouse* to the ADEA in *Reeves v. Sanderson Plumbing Products, Inc.*, which involved a disparate treatment age discrimination claim. 530 U.S. at 133. At trial, the employee presented evidence that the decision at issue was motivated by permissible and impermissible considerations. In particular, the employee presented testimony that the manager who made the decision to fire him had told him he "was so old [he] must have come over on the Mayflower" and on one occasion said that he "was too damn old to do [his] job." 530 U.S. at 151. The

[27] As noted, the 1991 Act made it easier for employees to establish employer liability for unlawful discrimination. *Price Waterhouse* imposed liability only if the employer was unable to satisfy its burden of persuasion as to causation. Under the 1991 Act amendments, an employer is liable after an employee shows the presence of an unlawful motive. An employer found liable under § 2000e-2(m) may limit remedies, but may not avoid liability, if it "demonstrates" it would have made the same decision absent the impermissible factor, formally making the "same decision" defense an affirmative one, at least as to remedy. Pub. L. No. 102-166, § 107. Nevertheless, what is relevant here is the 1991 Act's return of the burden of persuasion as to causation to the employee.

employer presented evidence that in making the decision to fire the employee, it was motivated by legitimate considerations, including the employee's conduct in falsifying company pay records. Despite the presence of "direct" evidence of impermissible considerations and other evidence of permissible considerations, or the presence of a quintessential "mixed-motive" case, the Court applied the *McDonnell Douglas* framework rather than the *Price Waterhouse* mixed-motive framework and found for the employee.

The Court should adopt a single framework for disparate treatment claims that requires the employee to bear the burden of persuasion on all elements of the claim, including showing that age was the outcome determinative factor in the adverse employment action at issue.[28] Under the *McDonnell*

[28] For all of the reasons discussed, adopting Gross's proposed *Mt. Healthy City School District Bd. of Education v. Doyle* framework would not resolve the question presented. 429 U.S. 274 (1977). Additionally, *Mt. Healthy* is of doubtful applicability here because that case involved a constitutional tort, not a statutory disparate treatment claim. *See Washington v. Davis*, 426 U.S. 229, 238-39 (1976). Moreover, reliance on *Mt. Healthy* is not useful in identifying the threshold evidentiary standard an employee must satisfy before a court should shift to the employer the burden of persuasion as to causation. In *Mt. Healthy*, the plaintiff presented evidence of a written admission that his exercise of First Amendment rights was a factor in the defendant's decision not to rehire him. *Id.* at 281-84. *Mt. Healthy* therefore did not attempt to define "substantial" factor or to articulate the threshold evidentiary showing a plaintiff must

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Douglas framework, once an employee presents a prima facie case of discrimination, the burden of production shifts to the employer to show a legitimate, non-discriminatory reason for the adverse employment decision. *St. Mary's Honor Ctr.*, 509 U.S. at 506-07. If the employer succeeds in carrying its burden of production, the *McDonnell Douglas* framework drops out of the picture, and "the trier of fact proceeds to decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against [him or her]' " because of the impermissible factor. *Id.* at 510-11.

The Court should overrule *Price Waterhouse* as it applies under the ADEA and hold that the employee

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make before the court will instruct a jury the burden of proving causation should be placed on the defendant.

Likewise, *NLRB v. Transportation Management Corporation*, 462 U.S. 393 (1983), is inapposite. In that case, the Court simply deferred to the NLRB's interpretation of the National Labor Relations Act, a law that does not contain language similar to 29 U.S.C. § 623(a)(1). The NLRB adopted a burden-shifting approach in cases alleging interference with rights guaranteed under the NLRA. In fact, the Court clearly stated that it would have deferred to the agency had it chosen not to impose a shifting burden. *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. at 401-04 ("We are unprepared to hold that [the Board's burden-shifting approach] is an impermissible construction of the Act. '[T]he Board's construction here, while it may not be required by the Act, is at least permissible under it' ") (quoting *NLRB v. J. Weingarten, Inc*., 420 U.S. 251 (1975)).

The issue in this case is whether the Court should read such a requirement into a federal statute. FBL contends it should not. *See Meacham*, 128 S.Ct. at 2406.

retains the burden of persuasion on all elements of a claim of disparate treatment. Because a burden-shifting instruction was erroneously given here, the decision of the court of appeals should be affirmed and the case remanded for a new trial.

II. IF *PRICE WATERHOUSE* IS RETAINED, AN EMPLOYEE CLAIMING DISPARATE TREATMENT AGE DISCRIMINATION MUST MAKE, AT THE LEAST, A SUBSTANTIAL SHOWING OF UNLAWFUL MOTIVATION TO JUSTIFY SHIFTING THE BURDEN OF PERSUASION ON CAUSATION TO THE EMPLOYER.

If the Court decides that *Price Waterhouse* remains good law, then *Price Waterhouse* should continue to govern cases under the ADEA. Gross's arguments are wholly inconsistent with *Price Waterhouse*. He argues in essence that once an employee makes a prima facie case under the *McDonnell Douglas* framework or suggests that the employer's explanation for its adverse action is pretextual, the burden of persuasion on causation shifts to the employer. This position is untenable for a multitude of reasons.

A. *Price Waterhouse* articulated a rule shifting the burden of persuasion to the employer only in extraordinary cases.

The Court in *Price Waterhouse* considered a case in which the employee was denied entrance into the partnership of the accounting firm Price Waterhouse. In addition to her prima facie case under *McDonnell Douglas*, the employee also presented a mass of evidence that the decisionmakers within the firm labored under sexist stereotypes. This evidence ranged from comments made by those reviewing the employee's candidacy to the post-determination explanation that the employee received.[29] As noted above, in a splintered decision, this Court held that in such circumstances, the burden of persuasion switched to the employer to prove that it would have made the same decision irrespective of its consideration of the impermissible factor.

Although this Court has not so held, for the reasons provided above, FBL believes that Justice O'Connor's concurring opinion states the holding of the Court. *See supra* at 28-29. In order to receive a burden-shifting instruction, a "plaintiff must show by

[29] For example, one partner described the female employee as "macho"; another stated she "overcompensated for being a woman"; and yet another suggested she "take a course at charm school." 490 U.S. at 235. The employer advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id*.

direct evidence that an illegitimate criterion was a substantial factor in the decision."[30] *Price Waterhouse*, 490 U.S. at 276 (O'Connor, J., concurring in the judgment). The court of appeals here correctly held that Gross failed to satisfy this standard. But even assuming that Justice O'Connor's opinion is not controlling, *Price Waterhouse* nonetheless requires that an employee present *substantial* evidence of discriminatory intent for the burden to shift to the employer. *See supra* at 29-30.

Because the burden shifting authorized in *Price Waterhouse* represented a significant departure from the text of Title VII, the general precepts of all civil litigation, and precedents with respect to the placement of the burden of persuasion, the Court carefully limited its reach. As Justice O'Connor explained, the mixed-motive framework was to "be viewed as a supplement to the careful framework established by" *McDonnell Douglas* and *Burdine*. 490 U.S. at 261-62. Under circumstances where the employee presented substantial and direct evidence of discrimination, Justice O'Connor opined that it would be appropriate to administer "the strong medicine" of shifting to the

[30] Although Gross repeatedly argues there should be no elevated evidentiary standard to prove a disparate treatment age discrimination claim, that is not the issue here. The issue is what evidentiary threshold a court should require an employee to satisfy before shifting the burden of persuasion on causation to the employer. For this reason, the term "circumstantial" is not once used in the challenged Eighth Circuit decision. Pet. App. 3a-12a.

employer the burden of persuasion on the issue of causation, but not under others. *Id.* at 262.

The objectives of the ADEA do not require a broader application of burden shifting. Workplace anti-discrimination laws are intended to maintain a careful balance between employer prerogatives and freedom of choice and employee's rights to be free from unlawful discrimination. *See Price Waterhouse*, 490 U.S. at 242-43; *McKennon*, 513 U.S. at 361; *McDonnell Douglas*, 411 U.S. at 800-01. The ADEA recognized the importance of this balance; indeed, one of its stated purposes is to *help* employers. 29 U.S.C. § 621(b) ("It is therefore the purpose of this chapter . . . to help employers and workers find ways of meeting problems arising from the impact of age on employment."). Gross's policy argument that the Court should make it easier for age discrimination plaintiffs to prove their claims at trial is "more properly addressed to legislators," not the Court. *Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 864 (1984).

If *Price Waterhouse* is retained, its requirement of a heightened evidentiary showing before burden shifting should also be retained. This departure from the ordinary conduct in civil litigation – in which the employee retains the burden of persuasion on all elements of his or her cause of action – should be permitted only in extraordinary circumstances.

Justice O'Connor's concurring opinion does not separate circumstantial evidence from direct evidence.

Instead, Justice O'Connor required that the evidence relate directly to the challenged decision. *Id.* at 277 (employee must satisfy evidentiary threshold by showing "*direct evidence* that decisionmakers placed substantial negative reliance on an illegitimate criterion *in reaching their decision*") (emphasis added). Indeed, as the United States explained in its brief *amicus curiae* in *Desert Palace*, "[v]irtually all of the courts of appeals have interpreted Justice O'Connor's reference to 'direct evidence' to require, at a minimum, that the plaintiff's evidence *directly relate to the decision-making process* that led to the adverse employment action at issue." Brief for the United States as Amicus Curiae Supporting Petitioner, p. 10, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (No. 02-679) (citing cases) (emphasis added).[31]

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[31] *See King v. United States*, 553 F.3d 1156, 1160 (8th Cir. 2009) ("[d]irect evidence is evidence showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action"); *Fye v. Okla. Corp. Comm'n*, 516 F.3d 1217, 1226 (10th Cir. 2008) (plaintiff must demonstrate through direct or circumstantial evidence the alleged unlawful motive "actually relates to the question of discrimination in the particular employment decision," with the qualification that circumstantial evidence must be tied "directly" to the retaliatory motive); *Atanus v. Perry*, 520 F.3d 662, 671 (7th Cir. 2008) (plaintiff may use direct or indirect method of proof to show disparate treatment discrimination, describing "[t]he focus of the direct method of proof thus is . . . whether the evidence 'points directly' to a discriminatory reason for the employer's action."); *Glanzman v. Metro. Mgmt. Corp.*, 391 F.3d 506, 512 (3d Cir. 2004) ("To be 'direct' for purposes of the *Price Waterhouse*

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FBL acknowledges that the precise meaning of the phrase "direct evidence" has been the subject of some debate among the courts of appeals, as the collection of cases in the United States' brief in *Desert Palace* reflects. The critical point, however, is that the *Price Waterhouse* requirement of substantial and direct evidence in order to shift the burden of persuasion on an element of an employee's cause of action serves an indispensable function if the burden is to be shifted at

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test, evidence must be sufficient to allow the jury to find that the decision makers placed a substantial negative reliance on the plaintiff's age in reaching their decision. . . . This means [the plaintiff] must produce evidence of discriminatory attitudes about age that were causally related to the decision to fire her"); *EEOC v. Warfield-Rohr Casket Co., Inc.*, 364 F.3d 160, 163-64 (4th Cir. 2004) (mixed-motive direct evidence framework requires "at most, evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision"); *Melendez-Arroyo*, 273 F.3d at 35 (direct evidence consists of "statements by a decisionmaker that directly reflect the alleged animus and bear squarely on the contested employment decision"); *Thomas v. Nat'l Football League Players Ass'n*, 131 F.3d 198, 203 (D.C. Cir. 1997) (plaintiff may use direct or indirect evidence to support a mixed-motive claim, clarifying that " '[d]irect evidence' for these purposes is evidence 'showing a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated' the adverse employment action"); *Raskin v. Wyatt Co.*, 125 F.3d 55, 60-61 (2d Cir. 1997) ("to warrant a mixed-motive burden shift, the plaintiff must be able to produce a 'smoking gun' or at least a 'thick cloud of smoke' to support his allegations of discriminatory treatment"). *But see Rowan*, 360 F.3d at 548 (distinguishing between direct and circumstantial evidence).

all. The requirement must be interpreted to have teeth.

Gross and the United States do not truly join issue with any of the foregoing. Instead, they argue that the nature of the heightened standard imposed by *Price Waterhouse* – the requirement of substantial or direct evidence – makes no sense, and that this Court has never adopted a test that turns on an artificial distinction between the probative value of direct and circumstantial evidence for proving one's claim. Petitioner's Brief 11, 13, 17; Brief for the United States 13, 15-16. Similarly, Gross and the United States argue that this Court's rejection of a direct evidence standard for proving willfulness in *Hazen Paper* suggests the Court should not impose any evidentiary threshold for burden shifting. Petitioner's Brief 24-25; Brief for the United States 16-17. These arguments are of a piece and are equally misplaced.

FBL does not dispute that an employee may rely on direct or circumstantial evidence to *prove* a disparate treatment age discrimination claim, just as an employee may use direct or circumstantial evidence to *prove* willfulness. The real issue is when, if ever, the burden of proving causation, or lack thereof, should *shift* to the employer in an ADEA case, particularly in those cases in which it matters most: when the evidence is in equipoise. Petitioner's Brief 47. Gross and the United States avoid this issue, failing even to articulate a standard for burden shifting other than that *some* evidence is sufficient.

Petitioner's Brief 27-30; Brief for the United States 11-12, 20-24. Under any reading, *Price Waterhouse* requires something more than *some* evidence to shift the burden of persuasion on causation to the employer.

Since Gross did not present such evidence, the court of appeals correctly found that the burden-shifting jury instructions were unlawful. *See infra* at 51-56.

B. Although Congress eliminated the application of *Price Waterhouse* to Title VII in the 1991 Act, that portion of the 1991 Act did not apply to the ADEA.

Gross and the United States argue the holding of *Desert Palace* should be engrafted onto the ADEA.[32]

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[32] Interestingly, in *Desert Palace* itself, the United States took the opposite position as to Title VII. It argued that the 1991 Act had not displaced *Price Waterhouse's* holding that an employee should be required to adduce direct evidence of discriminatory intent to invoke a jury instruction under § 2000e-2(m), and it further stated that

> the better reading of *Price Waterhouse* is that direct evidence means non-circumstantial or non-inferential evidence. In other words, in order to justify shifting the burden of persuasion to the defendant, the plaintiff must submit evidence that, without resort to inferences or presumptions, establishes that race or gender was a substantial, motivating factor in the employer's decision.

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They necessarily assume that *Desert Palace* means *Price Waterhouse* was overruled not only as it applied to Title VII, but also as applied to the ADEA. This is plainly wrong. *Desert Palace* interpreted specific provisions of the 1991 Act and found that the Act statutorily overruled *Price Waterhouse* in Title VII cases. But Congress deliberately chose not to apply its new provision to ADEA cases, and thus the analysis of *Desert Palace* is not applicable here.

Specifically, as noted above, the 1991 Act created a new Title VII claim, imposing liability on an employer when an employee "demonstrates" that an impermissible consideration "was a motivating factor for any employment practice, even though other factors also motivated the practice." Pub. L. No. 102-166, § 107 (now contained in 42 U.S.C. § 2000e-2(m)).

In *Desert Palace*, this Court examined the effect of the aforementioned language in the 1991 Act on *Price Waterhouse's* direct evidence requirement under Title VII. 539 U.S. at 92. Not surprisingly, given the clear language of the 1991 Act, and the legislative history surrounding its enactment,[33] the Court held a Title VII plaintiff presenting a claim under § 2000e-2(m) could establish liability merely by showing that an impermissible factor motivated the decision at

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Brief for the United States as Amicus Curiae Supporting Petitioner, p. 10, *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (No. 02-679).

[33] *See supra* at 36-37.

issue and without adducing any direct evidence to that effect. *Id.* at 101-02.

Contrary to Gross's and the United States' contentions in this case, *Desert Palace* and the relevant provisions of the 1991 Act had no effect on claims arising under the ADEA. As an initial matter, the language of the 1991 Act at issue in *Desert Palace* applies by its terms only to Title VII. 42 U.S.C. § 2000e-2(m). There is no similar language in the ADEA. Moreover, where Congress desired to amend the ADEA in the 1991 Act, it did so explicitly. For example, the 1991 Act amended the ADEA by conforming its limitations period to corresponding changes to Title VII. Pub. L. No. 102-166, § 115. Of equal importance, the legislative history reflects that Congress considered the application of specific cases to ADEA claims and specified cases that it was expressly disapproving for application under the ADEA. For example, in the House Report accompanying the bill, Congress referenced explicitly the "danger that *Lorance v. AT&T Technologies* . . . will continue to be applied under the ADEA, if the statute of limitations is changed in Title VII but not in the ADEA," and it amended the language of the ADEA to prevent such application. H.R. Rep. No. 102-40(I), at 97 (1991). Congress's express treatment of, and amendments to, the ADEA in the 1991 Act make clear that Congress's failure to apply Title VII's new provision to ADEA claims was a deliberate choice. *Price Waterhouse* remains governing as to ADEA claims, and *Desert Palace* – which construes a 1991 Act provision that

applies only to Title VII claims – is not applicable here.[34] *Russello*, 464 U.S. at 23; *Lehman*, 453 U.S. at 162-63.

This analysis is confirmed by this Court's recognition that it is the pre-1991 Act Title VII regime that is analogous to the ADEA and that governs claims arising under the ADEA. *See, e.g.*, *Smith*, 544 U.S. at 240 ("*Ward's Cove*'s pre-1991 interpretation of Title VII's identical language remains applicable to the ADEA."); *see also Meacham*, 128 S.Ct. at 2404 (noting

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[34] The United States contends that Congress could not have ratified *Price Waterhouse*'s application to ADEA claims in the 1991 Act because "there was no settled direct evidence requirement" when Title VII was amended in 1991. Brief for the United States 24. This argument fails for two reasons. First, Congress's deliberate decision not to extend the amendments to Title VII to the ADEA is, in effect, a ratification of the application of *Price Waterhouse* to the ADEA. Second, several appellate decisions addressed the application of *Price Waterhouse* to the ADEA before Congress passed the 1991 Act. *See Bay v. Times Mirror Magazine, Inc.*, 936 F.2d 112, 116 (2d Cir. 1991); *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 191-92 (2d Cir. 1991); *Wilson v. Firestone Tire & Rubber Co.*, 932 F.2d 510, 514 (6th Cir. 1991); *Villanueva v. Wellesley Coll.*, 930 F.2d 124, 131 (1st Cir. 1991); *Beshears v. Asbill*, 930 F.2d 1348, 1353-54 (8th Cir. 1991); *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 686 (7th Cir. 1991); *Visser*, 924 F.2d at 658; *Shager v. Upjohn Co.*, 913 F.2d 398, 402 (7th Cir. 1990); *Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512, 1518-19 (11th Cir. 1990); *Young v. City of Houston, Tex.*, 906 F.2d 177, 181-82 (5th Cir. 1990); *Ramsey v. City & County of Denver*, 907 F.2d 1004, 1008 (10th Cir. 1990); *Blake v. J.C. Penney Co., Inc.*, 894 F.2d 274, 278 (8th Cir. 1990); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1371 n.4 (2d Cir. 1989); *Grant*, 880 F.2d at 1568-69.

that *Smith v. City of Jackson* said "a plaintiff-employee's burden of identifying which particular practices allegedly cause an observed disparate impact . . . is the employee's burden under both the ADEA and the *pre-1991 Title VII*") (emphasis added). For the reasons noted above, FBL believes the Court should do so in this case once again.

C. The evidence presented at trial did not support a mixed-motive instruction and the corresponding shift of the burden of persuasion to FBL to show the absence of causation.

At base, Gross argues that the burden of persuasion should switch to the employer in an ADEA case when an employee presents evidence adequate to establish a *McDonnell Douglas* prima facie case or suggests that the employer's explanation for its adverse action is pretextual. This argument overlooks, and contradicts, more than 30 years of opinions endorsing, and explaining the purpose of, the ADEA and the role of the *McDonnell Douglas* framework in determining liability.

From the inception of this lawsuit, Gross attributed his demotion to "no apparent reason" and from this, concluded it must have been age because of the "lack of any other reason." Complaint ¶¶ 13, 15; J.A. 6. In closing argument, Gross's trial counsel conceded there was no evidence to show that the challenged

decision involved impermissible motives.[35] Instead, he asked the jury to disbelieve FBL and find he was demoted because of age on the theory that there was no other explanation for the demotion.[36] Gross's

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[35] Gross's counsel acknowledged there was no direct evidence of age discrimination, by any definition

> [O]ne of the things that you've been told is that all these people didn't see discrimination, they didn't hear discrimination. And how do you find discrimination? And how you find it here, when people are unwilling to admit it, is that you look at the actions. You look at the facts. You look at the circumstances. You look at the end result. Tr. 740.
>
> There was not a shred of evidence of – you know, piece of paper that you could see that said I need to put Jack in this position because he's too old, his time has passed, and put the old guy out to pasture. You didn't see that. But you don't have to see that to find discrimination. You don't have to see that. Tr. 741.
>
> So the absence of a piece of paper, the absence of an admission by one person that said, oh, yeah, I heard Andy say Jack is getting too old, or Barb Moore or Steve Wittmuss, they didn't say that and you don't have to hear that. You don't have to see it to know that what happened to him was discrimination. Tr. 741.
>
> And it's important for you to remember when you go back into that jury room, again, that you don't have to have that smoking gun. You don't have to have the admission. None of these people coming in and saying no doesn't mean that you shouldn't find for Jack Gross. Tr. 746.

[36] Gross's counsel argued

> [W]e know that age was a motivating factor because of the incredible reasons that Farm Bureau has given to support the demotion that they couldn't back up, that

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counsel conceded the absence of direct evidence of discrimination at a post-trial hearing on FBL's Renewed Motion for Judgment as a Matter of Law. Appellant's Appendix 596. Additionally, the district court recognized Gross did not present substantial or direct evidence of age discrimination at trial.[37]

Gross's effort to justify the mixed-motive instruction, under these facts, reveals that he is in effect asking this Court to place determinative weight on the prima facie case from *McDonnell Douglas*. That prima facie case is too weak a reed to bear such weight. This Court crafted the *McDonnell Douglas* framework as a means of establishing an order for the presentation of proof. *St. Mary's Honor Ctr.*, 509

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the facts of this case simply don't support. We also know that age was a factor in the demotion because there simply was no other reason to demote Jack Gross. Tr. 694.

And when you think about it, there is no explanation other than age for the demotion. Tr. 701.

[37] The district court stated in a post-trial order:

Here, the court finds that while the jury ultimately returned a verdict in favor of plaintiff on his claims of age discrimination, neither liability nor damages were "fairly certain." Defendant presented evidence of a legitimate, nondiscriminatory reason for demoting plaintiff and, in the absence of any direct evidence of discrimination, the jury had to rely on circumstantial evidence and inferences of discrimination to conclude that defendant discriminated against plaintiff based on his age.

Appellee's Appendix 174.

U.S. at 506. For that reason, this Court has noted that the burden of establishing a prima facie case of disparate treatment is "not onerous," *Burdine*, 450 U.S. at 253, and a prima facie case "is not the equivalent of a factual finding of discrimination," *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978).

Moreover, Gross's proposed standard would permit a jury to find an employer liable upon an employee's mere suggestion of mendacity by an employer, regardless of whether age motivated the decision. Indeed, Gross now justifies the mixed-motive instruction with that very contention, arguing "[i]f as to even *one* of those proffered justifications the jury concluded that it was a phony explanation, the jury could have inferred . . . that age was a motivating factor." Petitioner's Brief 48 (emphasis in original). This Court rejected the standard Gross proposes in *St. Mary's Honor Center*. 509 U.S. at 519.

Nor would Gross's proposed test comport with Congress's purposes in enacting the ADEA. It simply sets too low a standard for shifting the burden of persuasion on an element of the employee's claim. Employers may consider factors that readily correlate with age, such as years of service or salary, without violating the ADEA. *See Ky. Ret. Sys.*, 128 S.Ct. at 2369-70 (holding that employer may consider pension status even when correlated with age); *Hazen Paper*, 507 U.S. at 609-11. Nevertheless, Gross almost solely identified as evidence of age discrimination just this

type of factor, including years of service, voluntary early retirement incentive packages, and salary.[38] Shifting the burden of persuasion based on such evidence allows an inference of unlawful discrimination to arise from employers' wholly legitimate personnel decisions.[39]

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[38] FBL asked the district court to instruct the jury regarding the governing law to avoid such confusion. Appellant's Appendix 21 ("Defendant is entitled to make its own subjective personnel decisions, absent intentional age discrimination, even if the factor motivating the decision is typically correlated with age, such as pension status, salary or seniority"). Tr. 673-75. FBL objected to the district court's refusal to do so.

[39] Gross's argument that FBL could have overcome the error in the instructions by showing that it would have made the same decision absent consideration of Gross's age is unavailing. FBL's trial strategy was based on Eighth Circuit precedent recognizing that a mixed-motive instruction would be improper here because Gross did not have substantial or direct evidence of intentional age discrimination. Neither discovery nor the material facts identified by Gross in resisting FBL's Motion for Summary Judgment gave FBL any reason to expect Gross to present substantial or direct evidence of age discrimination at trial. In fact, Gross offered no such evidence. The district court informed the parties of its final decision to use a mixed-motive instruction after the close of the evidence. The jury would surely have noticed (to the prejudice of FBL) if FBL changed its strategy between opening statement and closing argument. Gross's argument that an employer need only present argument regarding the same-decision defense to avoid liability overlooks the reality of trial by jury and the substantial risk that a jury will interpret an employer's same-decision argument as an implicit admission that an impermissible factor played a role in the adverse decision at issue.

The evidence at trial simply did not contain facts sufficient to support a finding that age was a substantial motivating factor in Gross's demotion. On this record, the district court's jury instructions improperly charged the jury because the instructions shifted the burden of proving the absence of causation to FBL. The court of appeals correctly reversed and remanded for a new trial.

CONCLUSION

The judgment of the court of appeals should be affirmed, and the case remanded for a new trial.

Respectfully submitted,

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